

Whistleblower Protection Provisions Enforced By OSHA

The Occupational Safety and Health Administration (OSHA) administers the employee protection (or “whistleblower”) provisions of fourteen statutes.

Occupational Safety & Health Act (OSH Act), 29 USC § 660(c)

Surface Transportation Assistance Act (STAA), 49 USC § 31105

Asbestos Hazard Emergency Response Act (AHERA),
15 USC § 2651

International Safety Container Act (ISCA), 46 USC App. § 1506

Energy Reorganization Act of 1974 (ERA), 42 USC § 5851

Clean Air Act (CAA), 42 USC § 7622

Safe Drinking Water Act (SDWA), 42 USC § 300j-9(i)

Federal Water Pollution Control Act (FWPCA), 33 USC § 1367

Toxic Substances Control Act (TSCA), 15 USC § 2622

Solid Waste Disposal Act (SWDA), 42 USC § 6971

Comprehensive Environmental Response, Compensation and
Liability Act (CERCLA), 42 USC § 9610

Wendell H. Ford Aviation Investment and Reform Act (AIR21),
49 USC § 42121

Sarbanes–Oxley Act (SOA), 18 USC § 1514A

Pipeline Safety Improvement Act (PSIA), 49 USC § 60129

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Who is Covered

Under the OSH Act, employees who believe that their employer has discriminated or retaliated against them for raising or reporting safety or health concerns may file a complaint with OSHA. Under the Surface Transportation Assistance Act (STAA), employees in the trucking industry may file complaints with OSHA if they believe that their employer has discriminated against them for reporting safety concerns or for refusing to drive under dangerous circumstances or in violation of safety rules.

Similarly, under the other statutes, employees also may file complaints with OSHA if they believe that their employer has discriminated against them for reporting protected safety concerns involving the airline or pipeline industries, for reporting protected environmental concerns including asbestos in schools, or for reporting potential securities fraud.

The Department of Labor also enforces the anti-retaliation provisions of several other statutes that are not administered by OSHA. Information concerning many of these additional anti-retaliation statutes is available in other sections of the *Guide* describing the statutes enforced by different Department agencies, such as the Wage and Hour Division (www.wagehour.dol.gov), the Employee Benefits Security Administration (www.dol.gov/ebsa), and the Mine Safety and Health Administration (www.msha.gov).

Basic Provisions/Requirements

Generally, the employee protection provisions listed above prohibit an “employer” or any “person” (the definition of which may vary from statute to statute) from discharging or otherwise discriminating against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment because the employee engaged in specified “protected” activities.

The protected activities typically include: (1) initiating a proceeding under, or for the enforcement of, any of these statutes, or causing such a proceeding to be initiated; (2) testifying in any such proceeding; (3) assisting or participating in any such proceeding or in any other action to carry out the purposes of these statutes; or (4) complaining about a violation.

The Energy Reorganization Act of 1974 (ERA), the Wendell H. Ford Aviation Investment and Reform Act (AIR21), the Sarbanes–Oxley Act (SOA), and the Pipeline Safety Improvement Act (PSIA) specifically cover an employee’s internal complaints to his or her employer, and it is the Secretary’s position, as set forth in regulations, that employees who express safety or quality assurance concerns internally to their employers are protected under the other whistleblower statutes. With the exception of the Fifth Circuit, the courts of appeals that have considered whether internal complaints are protected have agreed with the Secretary.

Employee Rights

An employee who believes that he or she has been discriminated against in violation of any of the statutes listed above may file a complaint with OSHA. Complaints must be filed within 30 days after the occurrence of the alleged violation under the OSH Act, the Clean Air Act (CAA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Solid Waste Disposal Act (SWDA), the Federal Water Pollution Control Act (FWPCA), the Safe Drinking Water Act (SDWA), and the Toxic Substances Control Act (TSCA); within 60 days under the International Safety Container Act (ISCA); within 90 days under the AIR21, the SOA, and the

Asbestos Hazard Emergency Response Act (AHERA); and within 180 days under the STAA, the ERA, and the PSIA. Under the SOA, if the Secretary has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the employee, the employee may bring an action at law or equity in district court.

Compliance Assistance Available

More detailed information, including copies of regulatory and interpretative materials, may be obtained from the nearest OSHA office (www.osha.gov/html/RAmap.html). Additional compliance assistance information is available from the OSHA Web site at www.osha.gov or by contacting OSHA's help line at 1-800-321-OSHA (1-800-321-6742).

Investigations/Penalties/Sanctions

Upon receipt of a timely complaint, OSHA notifies the employer and, if conciliation fails, conducts an investigation. Where OSHA finds that complaints filed under the OSH Act, the AHERA, and the ISCA have merit, they are referred to the Solicitor's Office for legal action. Complaints under these three statutes found not to have merit will be dismissed.

Where OSHA finds a violation after investigating complaints under the other statutes listed above, it will issue a determination letter requiring the employer to pay back wages, reinstate the employee, reimburse the employee for attorney's and expert witness fees, and take other steps to provide necessary relief. Complaints found not to have merit will be dismissed.

Parties who object to OSHA's determinations under the statutes listed above (except for the OSH Act, the AHERA, and the ISCA) may request a hearing before the Department of Labor's Office of Administrative Law Judges (OALJ). Judges' decisions are reviewed by the Department of Labor's Administrative Review Board, which the Secretary has designated to issue final agency decisions.

Under the STAA, if OSHA finds in favor of the employee, litigation usually is conducted by the Solicitor's Office, but sometimes by the employee. Under the other statutes, litigation generally is conducted by the private parties themselves. Employers and employees may seek judicial review of an adverse ARB decision.

Under the AIR21, the SOA, and the PSIA, employees who file complaints frivolously or in bad faith may be liable for attorney's fees up to \$1,000.

Relation to State, Local, and Other Federal Laws

The Supreme Court has held that the employee protection provisions of the ERA do not preempt existing state statutes and common law claims. The other statutes listed above should be consulted separately to determine whether or not their employee protection provisions are supplementary to protection provided by state laws.

Plant Closings and Mass Layoffs

Worker Adjustment and Retraining Notification Act (WARN) (29 USC §2101 *et seq.*; 20 CFR Part 639)

Who is Covered

The Worker Adjustment and Retraining Notification Act (WARN) generally covers employers with 100 or more employees, not counting those who have worked less than six months in the last 12 months and those who work an average of less than 20 hours a week. Regular federal, state, and local government entities that provide public services are not covered. Employees entitled to notice under WARN include managers and supervisors as well as hourly and salaried workers.

Basic Provisions/Requirements

WARN protects workers, their families, and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice gives workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain other jobs and, if necessary, to enter skill training or retraining that will allow these workers to compete successfully in the job market. WARN also provides for notice to state dislocated worker units so that they can promptly offer dislocated worker assistance.

A covered plant closing occurs when a facility or operating unit is shut down for more than six months, or when 50 or more employees lose their jobs during any 30-day period at a single site of employment. A covered mass layoff occurs when a layoff of six months or longer affects either 500 or more workers or at least 33 percent of the employer's workforce when the layoff affects between 50 and 499 workers. The number of affected workers is the total number laid off during a 30-day (or in some cases 90-day) period.

WARN does not apply to closure of temporary facilities, or the completion of an activity when the workers were hired only for the duration of that activity. WARN also provides for less than 60 days notice when the layoffs resulted from closure of a faltering company, unforeseeable business circumstances, or a natural disaster.

Employee Rights

Workers or their representatives, and units of local government may bring individual or class action suits. U.S. district courts enforce WARN requirements. The Court may allow reasonable attorney's fees as part of any final judgment.

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